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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CITY OF ZION, et al.,

Petitioners,

v.

CLINT W. HARRIS, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether governmental seals may contain religious imagery for historical reasons without violating the Establishment Clause?
2. Should standing be afforded a transient plaintiff who was recruited to bring an Establishment Clause action?
3. Whether religious imagery on governmental seals violates the Establishment Clause, absent some form of government coercion?

THE PARTIES

1. The Petitioners, who were the Appellants in the Court of Appeals, are the City of Zion, Lake County, Illinois, Mayor of Zion and Zion City Council. At the time this suit was filed, the Mayor was Adeline J. Geo-Karis. Since then, Adeline J. Geo-Karis has been replaced as Mayor by Billy J. McCullough. Also at the time this suit was filed, the City Council members were Billy J. McCullough, W. Lane Harrison, L. Howard Bennett and Amos J. Monk. Since then, Billy McCullough has been replaced by Charles Blair as a City Council member.

2. The Respondents, who were the Appellees in the Court of Appeals, are Clint W. Harris and the Society of Separationists, Inc.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in this case. In the alternative, Petitioners respectfully request that this Court defer its decision on this petition until it has reached a decision on the merits in *Lee v. Weisman*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted* 111 S. Ct. 1305 (1991).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported and is reproduced in the Appendix at App. 1a.

The Order of the United States Court of Appeals for the Seventh Circuit denying the petitions for rehearing

with suggestions for rehearing in banc is not yet reported and is reproduced in the Appendix at App. 48a.

The Memorandum Opinion and Final Judgment Order of the United States District Court for the Northern District of Illinois is reported at 729 F.Supp. 1242, and is reproduced in the Appendix at App. 53a.

The Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois denying the motion for reconsideration and staying the enforcement of the permanent injunction pending appeal was not reported and is reproduced in the Appendix at App. 71a.

JURISDICTION

The opinion of the United States Court of Appeals for the Seventh Circuit was entered on March 19, 1991. Petitions for rehearing with suggestions for rehearing in banc were filed on April 2, 1991. The petitions were denied on June 10, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Establishment Clause of the First Amendment to the United States Constitution which provides: "Congress shall make no law respecting an establishment of religion."

STATEMENT OF THE CASE

A. The Origin of the City of Zion as a Religious Utopian Community and the Adoption of its Seal, Emblem and Logo

The City of Zion was incorporated in 1902 as a utopian religious community—a dream of Reverend John Alexander Dowie. Reverend Dowie was founder of both the Christian Catholic Church and the City of Zion (Cook Aff. Par. 6; Geo-Karis Aff. Par. 12)[1]

In that same year, the Zion City Council, by ordinance, adopted Zion's corporate seal. Reverend Dowie created the design of the original seal and presented it to the City Council as a gift. The City Council adopted the seal, which was described as follows (City Council Minutes, May 6, 1902 at 96-97):

> Circular in form, and to be so constructed as to impress upon paper the words "Corporate Seal" above, and the "City of Zion, Illinois" below the outer edge thereof, with the Zion Banner in the centre surmounted by the declaration, "God Reigns," such banner having upon it the word "Zion" below, a dove with an olive branch above, a cross at the left, and a sword and crown at the right.

Reverend Dowie is quoted in the Minutes of the May 6, 1902 City Council meeting as giving religious significance to each of the symbols in the seal. According to Reverend Dowie, the Cross represented Redemption, Salvation, Healing, Cleaning and Keeping Power. The Dove

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[1] References in this Statement of the Case are made to the Affidavits of Philip L. Cook and Adeline J. Geo-Karis, as well as to the City Council Minutes of May 6, 1902, November 26, 1965, and May 20, 1986. These documents appear in the Record under Docket No. 68. Cook's Affidavit is Ex. H, Geo-Karis' Affidavit is Ex. I, and the City Council Minutes are Ex. J.

was the emblem of the Holy Spirit bearing the Message of Peace and Love over the Seas. The Sword was the Sword of the Spirit which was the Word of God and the Crown was the Crown of Glory, Joy, Righteousness and Rejoicing. A copy of the Zion corporate seal is reproduced in the Appendix at App. 30a.

Reverend Dowie was a faith healing minister from Australia, who started his religious movement, the Christian Catholic Church, in Chicago, Illinois. Having achieved great success there, he bought 6,000 acres on the shores of Lake Michigan to develop a city that he hoped would be utopia on earth. In a few years the population of the city grew to 10,000. It had its own school system, and the movement's parishioners worked in the town's industries, giving their earnings to the church. This planned community has biblical names for its north-south streets. The *Naming of America*, Allan Wolk, First Edition (1977).

"Zion"—the name itself—is inspired by the Bible. In the Old Testament, Zion was the easternmost of the two hills of ancient Jerusalem, the site of the Jebarite city captured by David, King of Israel and Judah, in the 10th Century B.C. (II Sam. 5:6-9), and established as his royal capital. "Zion" appears in the Old Testament 152 times as a title of Jerusalem, and appears seven times in the New Testament.

At the time of its origin, Zion's political and religious life were intertwined. However, by the mid-1930s, the city's major political party, the Theocratic party, lost political control of the city (Cook Aff. par. 21). The Christian Catholic Church divested itself of much of the land it owned through various receiverships. Many of Zion's industries were owned by people outside Zion. Between 1934 and 1940 the last vestiges of the original theocracy fell away. (Cook Aff. par. 19-23). Since that time, Zion has existed

as a typical American community in its politics and government.

Zion's shops, hospitals, industries, churches, schools and people present a picture of "Mainstreet U.S.A." (Cook Aff. par. 7). The Blue Laws, which originally prohibited facilities such as drug stores, hospitals or golf courses, have long since been repealed. The last factory associated with the original Christian Catholic Church ceased operation in 1988. (Cook Aff. par. 7 and 9).

By state law, the corporate seal of a municipality is "changeable at pleasure." *Ill.Rev.Stat.* ch. 24, Sec. 2-3-8 (1989). Although Zion is no longer the utopian religious community of Reverend Dowie, the seal has been maintained by the current City Council for historical reasons. (City Council Minutes, May 20, 1986 at 470; Geo-Karis Aff. par. 7). The only change in the seal since 1902 has been to replace the sword with a scepter.

In 1965, the City Council authorized Paul Holten, a commercial artist residing in Zion, to design the city emblem for the doors of the city's vehicles (City Council Minutes, November 26, 1965 at 409). The emblem contains the same imagery as the seal and is also found on the shoulder patches worn by Zion's police, fire and rescue personnel (Geo-Karis Aff. par. 6). Since 1983, the emblem has also appeared on the city's vehicle stickers which Zion residents display on the windshields of their cars (Geo-Karis Aff. par. 8). A copy of the Zion city emblem is reproduced in the Appendix at App. 31a.

In 1978, Zion constructed a water tank for municipal use. A horizontal red stripe encircles the white tank. On two sides of the tank a white circular design is painted within the red stripe. The circle is divided by a large "Z". Above the "Z" is a dove with an olive branch. A cross is located to the left of the "Z" and a crown and scepter

to the right. It is this design which is referred to as a logo. This logo is also located on the upper lefthand corner of Zion's street name signs. A copy of the Zion city logo is reproduced in the Appendix at App. 32a.

Professor Philip Cook, a history professor at Western New Mexico University, has devoted more than twenty years of study to the historical significance of Zion. Dr. Cook notes that the symbols on Zion's seal, emblem and logo should be viewed in an historical sense rather than a vacuum (Cook Aff. par. 1-4 and 24). Zion was one of a unique group of nineteenth century communities that experimented with utopian living. Some were secular and others were religiously oriented. Although most of these experiments have long since vanished, many have left physical manifestations of their existence as a remembrance of times past and as a tribute to the freedom of America that permitted them to exist (Cook Aff. par. 30-32). According to Professor Cook, the imagery on Zion's seal, emblem and logo are just such a remembrance (Cook Aff. par. 33-34).

Today, Zion boasts over thirty places of worship, including a Muslim temple, as opposed to its one original church. Zion does not favor any of these religious institutions over any other, nor does it favor religious institutions over non-religious institutions (Geo-Karis Aff. par. 15). Zion provides no financial or other support to any church or religion and it is not involved in the affairs of any church or religion (Geo-Karis Aff. par. 15). Adeline Geo-Karis, who was the Mayor of Zion at the time this case was filed, has never been a member of the Christian Catholic Church or any other church within Zion (R. Doc. 68, Geo-Karis Aff. par. 2 and 3). Yet, Zion, like any community, takes pride in its origins, and has retained its seal, emblem and logo to commemorate its history and rich cultural heritage (Geo-Karis Aff. par. 4-9).

B. The Plaintiff Clint W. Harris' Transient Relationship with the City of Zion

In March, 1986, Robert Sherman, an atheist who resides in Buffalo Grove, Illinois, saw Zion's logo on the city's water tower as he was driving by it (Sherman Dep., p. 6, 30, 36-37).[2] Between March, 1986 and July, 1987, Sherman talked with several people about being a potential plaintiff in a lawsuit against Zion which would challenge the symbols now at issue. They all declined (Sherman Dep. p. 47-50). Sherman also brought Zion's symbols to the public's attention in radio, television and newspaper interviews hoping to attract the attention of a Zion resident who would want to seek recourse against the city (Sherman Dep. at 50-51).

In early 1987, Sherman met Clint W. Harris through a local chapter of the American Atheists. Harris joined the American Atheists in May, 1987 (Harris Interrog. Resp. No. 5). During the May, 1987 chapter meeting of the American Atheists which Harris attended, Sherman discussed Zion and its symbols (Sherman Dep. p. 58). During the first week of July, 1987, Sherman took Harris through Zion. They spent approximately two hours there (Sherman Dep. p. 46).

Within the week, on July 7, 1987, Harris moved to Zion (Harris Interrog. Resp. No. 9(a); Sherman Dep. p. 59). Harris rented a room in a "dorm-like" building in Zion on a weekly basis. His room was for sleeping purposes only (Harris dep. at 17, 21-22). This lawsuit was filed approximately one month later. Prior to the suit's being

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[2] References in this Statement of Case are made to the depositions of Robert Sherman and Clint W. Harris and Clint W. Harris' responses to interrogatories. These documents appear in the Record under Docket No. 68.

filed, Harris spoke to no attorneys and he never saw the Complaint (Harris dep. p. 61-62).

In the Third Amended Complaint, Harris claimed standing to challenge the Zion seal by alleging, among other things, that "He is required to display, in the design of the City's vehicle sticker affixed to the left side of the windshield of his automobile, the City's objectionable seal that is part of the subject matter of this action. The sticker is immediately in front of Mr. Harris and he must view it during the totality of his driving time. He cannot escape the unwelcome exposure other than by not driving his automobile." (R. Doc. 42, Par. 5).

Also in his affidavit, Harris claimed standing to challenge the Zion logo by stating, among other things, that; "In order to avoid seeing the Zion logo on the Zion Water Tower, I avoid driving during daylight hours along the fastest route to Chicago from Zion because that route would take me within viewing distance of the Zion Water Tower." (R. Doc. 61, Harris Aff. par. 5).

However, in his deposition, Harris admitted that he did not own an automobile and did not currently have a car in Zion (Harris dep. p. 95-96).

C. The District Court Proceedings and Decision

The Plaintiffs, Clint Harris and the Society of Separationists, sued the City of Zion, the Mayor of Zion and the Zion City Council, Defendants, under 42 U.S.C., Section 1983, alleging that Zion's seal, emblem and logo violate the Establishment Clause and seeking a permanent injunction against their continued use. In a companion case, the City of Rolling Meadows was also sued by the Society of Separationists and an individual plaintiff with respect

to its seal. Both cities' seals contain an assemblage of symbols which include a small Latin cross.

The cases were consolidated and the parties filed motions for summary judgment. On February 9, 1990, the District Court issued a written Memorandum Opinion and Final Judgment Order granting summary judgment in favor of the Plaintiffs and against the City of Zion, its Mayor and City Council, and permanently enjoining the seal, emblem and logo in their present form. In the same memorandum opinion, the District Court denied summary judgment to the Plaintiffs in the Rolling Meadows case and approved the Rolling Meadows seal in its present form. App. 53a-68a.

The City of Zion, its Mayor and City Council filed a motion for reconsideration or, in the alternative, a stay of injunction pending appeal on February 21, 1990. In a Memorandum Opinion and Order entered on March 12, 1990, the District Court denied the motion for reconsideration, but stayed enforcement of the permanent injunction pending appeal. App. 71a-73a.

D. The Court of Appeals Proceedings and Decision

The City of Zion, its Mayor and City Council filed an appeal to the Court of Appeals for the Seventh Circuit. Also, the Plaintiffs in the Rolling Meadows case filed an appeal. The two appeals were consolidated. A majority of the Court of Appeals affirmed the granting of an injunction in the Zion case and reversed the denial of an injunction in the Rolling Meadows case. Judge Easterbrook dissented. App. 1a-45a.

The City of Zion, its Mayor and City Council filed petitions for rehearing with suggestions for rehearing in banc

on April 2, 1991. The petitions were denied by a vote of 6 to 5 in an order entered on June 10, 1991. Judges Cudahy, Posner, Coffey, Manion and Kanne voted to grant rehearing in banc. App. 48a-52a.

Judge Easterbrook voted against the rehearing in banc, but not because he had second thoughts about the position stated in his dissenting opinion or doubt about the importance of the issues. Instead, he stated that this case should proceed without further delay "to the court that can resolve the issues the panel addressed Cf. *Lee v. Weisman*, 111 S. Ct. 1305 (1991) granting cert. to review 908 F.2d 1090 (1st Cir. 1990)." App. 50a.

Also, Judge Cudahy, with whom Judge Manion concurred, stated that this important opinion needs careful consideration by this Court. App. 52a.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted by this Court for several reasons:

1. The City of Zion's seal, emblem and logo are not an unconstitutional endorsement of the Christian faith and Christian Catholic sect, as found by the majority on the Court of Appeals, but, rather, a permissible acknowledgment of Zion's unique history, religious origins and rich, cultural heritage, and this Court should grant certiorari in this case and so rule.

2. In the order denying the petitions for rehearing with suggestions for rehearing in banc, three judges on the Court of Appeals for the Seventh Circuit, Easterbrook, Cudahy and Manion, have urged this Court to take this case. App. 50a-52a.

3. This case, together with *City of Rolling Meadows v. Kuhn*, which was decided by the Court of Appeals for the Seventh Circuit at the same time as this case, presents an excellent opportunity to resolve the question of whether governmental seals may contain religious imagery for historical reasons without violating the Establishment Clause. A petition for certiorari in the *Rolling Meadows* case, is also pending before this Court, No. 91-141.

4. This case also presents this Court with an excellent opportunity to resolve the question of whether standing should be afforded transient plaintiffs who are recruited to bring Establishment Clause actions.

5. This case fits with other cases presently before this Court, namely:

A. *Lee v. Weisman*, No. 90-1014, in which this Court has issued a writ of certiorari to address the related question of whether school authorities violate the Establishment Clause by allowing a speaker at a public junior high school graduation ceremony to offer an invocation and a benediction that acknowledge a deity.

B. *Village of Crestwood v. John Doe*, 917 F.2d 1476 (7th Cir. 1990), *petition for cert. filed* No. 90-1573, in which this Court has before it a petition for certiorari presenting the related question of whether a Village violates the Establishment Clause by sponsoring a 45-minute traditional Italian mass on a Saturday afternoon as part of a weekend-long Italian festival celebrating Italian culture and heritage.

6. This case, together with the *Lee* and *Village of Crestwood* cases, presents this Court with an excellent opportunity to resolve the question of whether religious imagery on governmental seals violates the Establishment Clause, absent some form of governmental coercion.

I.

OUR NATION HAS A LONG RELIGIOUS TRADITION AND GOVERNMENTAL SEALS SHOULD BE PERMITTED TO CONTAIN RELIGIOUS IMAGERY FOR HISTORICAL REASONS WITHOUT VIOLATING THE ESTABLISHMENT CLAUSE.

In finding the City of Zion's seal, emblem and logo unconstitutional and barring them from further use, the Court of Appeals for the Seventh Circuit relied upon the three-prong purpose, effect and entanglement test in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Court held that the Zion seal failed both the purpose and effect test, and rejected the Defendant's contention that Zion's City Council voted in 1986 to retain the seal for historical reasons and that the seal was being retained to acknowledge and commemorate the city's unique origin as a religious utopian community. App. 24a-26a.

The Court ruled that sectarian religious imagery has no place whatsoever on municipal seals; that a city endorses everything on its seal; and that the religious imagery on the Zion seal was unconstitutional as an "endorsement" of the Christian faith and the Christian Catholic sect. App. 27a. The Petitioners submit that the Court misconstrued the Zion seal as an endorsement of the Christian faith and the Christian Catholic sect when the current purpose in retaining the seal is purely commemorative and the present effect of the seal is only to call a unique history to mind.

In 1902, the purpose of Reverend Dowie in establishing the City of Zion was religious and the purpose of the seal which he designed and gave to the city was religious. However, that purpose no longer exists and is not relevant. Under Illinois law, the City Council, whose membership is subject to change with each election, has the right

to modify the seal at any time. *Ill.Rev.Stat.*, Ch. 24, Section 2-3-8 (1989). It is not bound to retain a seal adopted in 1902. The fact that it has freely chosen to do so implies a current legislative purpose in keeping with the city as it exists today. On May 20, 1986, the City Council voted to retain the seal in its current form for historical reasons.

The original purpose of a government's use of a symbol has little if any relevance to an analysis of whether its current use has a secular purpose. *McGowan v. Maryland*, 366 U.S. 420, 445 (1961); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 126 (7th Cir. 1987); *Florey v. Sioux Falls School District*, 619 F.2d 1311, 1315 (8th Cir.), *cert. denied* 449 U.S. 987 (1980); and *Eugene Sand & Gravel, Inc. v. City of Eugene*, 276 Or. 107, 558 P.2d 338 (1976).

There is no present involvement between the City of Zion and the Christian Catholic Church. As Judges Cudahy and Manion noted in their dissent to the denial of the petitions for rehearing: "It is significant that the Zion city council, containing *no members* of the 'Christian Catholic' sect and presumably therefore victims rather than beneficiaries of the seal's imagined religious implications, voted with enthusiasm to keep it as their historical heritage." App. 52a.

The City of Zion does not favor any of the thirty places of worship in the municipality over any other. All are treated equally within the municipality. The City of Zion does not endorse religion over non-religion. It gives no financial support to any church or religion and it is not involved in any church or religion (R. Doc. 68, Geo-Karis Aff. par. 15). Neither the City of Zion seal nor the shield-shaped design in the center of the seal is or ever has been

a part of the official seal of the Christian Catholic Church (R. Doc. 74, Ottersen Aff.).

Extreme cases of symbolic recognition or accommodation of religious faith may be deemed to violate the Establishment Clause, as Justice Kennedy pointed out in his dissent in *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989). Justice Kennedy cited, as an example of such an extreme case, a permanent erection of a large Latin cross on the roof of city hall, which would be taken as an "obvious effort to proselytize on behalf of a particular religion." *Id.* at 3137.

The cross here in question is small and unobtrusive. It is not central to the seal as was the cross on the seal in *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985). There, the cross, which occupied roughly half the seal, was set in a blue background depicting the sky over four darker blue mountains and a green plain with eight small sheep. The cross was the central symbol and dominated the seal being highlighted by white edging and a blaze of golden light.

The other symbols on the Zion seal do not individually, or taken as a group, endorse religion in the eyes of an average, reasonable non-adherent. The banner with the words, "God Reigns" may offend hypersensitive zealots, but should be no more offensive to an average, reasonable non-adherent than the legend "In God We Trust" appearing on our dollar bills, which was challenged and upheld in *Arnow v. United States*, 432 F.2d 242 (9th Cir. 1970). The name "Zion" is no different than the names of other American cities derived from the Bible, such as Macedonia, Ohio; Babylon, New York; Damascus, Maryland; Bethlehem, Pennsylvania; and Tabernacle, New Jersey. Many other cities have names inspired by the Christian

faith, i.e., Los Angeles, California, Corpus Christi, Texas, or are named for Christian saints, such as St. Louis, Missouri, and Saint Augustine, Florida. The dove and olive branch, crown and scepter and shield represent such old-fashioned virtues as peace, honor, authority and achievement. Standing alone or together, they should not cause a reasonable non-adherent to close his eyes to avoid having to see them.

There are many governmental religious acknowledgments —both sectarian and non-sectarian—which are not deemed religious endorsements. On the Great Seal of the United States, the eye above the pyramid, surrounded by rays of light, is the eye of God and alludes to hoped-for divine favor. The mottoes "Annuit Coeptis" and "Novus Ordo Seclorum" mean "He has Favored (Our) Undertaking," and "A New Order of the Ages." The Great Seal of the Confederacy proclaimed, "Deo Vindice," meaning "With God as Defender." The *Encyclopaedia Americana*, Vol. 13, pp. 352-53, International Edition (1988).

Moreover, there are numerous signs, symbols and proclamations acknowledging God throughout our government. The Pledge of Allegiance to the flag was revised by Congress in 1954 to describe the United States as "One Nation Under God," 36 U.S.C. 172. In 1950, Congress designated Memorial Day as a day of "prayer for permanent peace." 36 U.S.C. 169g. In 1952, Congress directed the President to proclaim a National Day of Prayer each year "on which (day) the people of the United States may turn to God in prayer and meditation at churches, in groups and as individuals" 36 U.S.C. 169h. The legend, "In God We Trust" has been inscribed on our nation's currency since 1865, 31 U.S.C. 5112(d)(1) and was made the national motto in 1956.

Some have been sectarian, acknowledging our Nation's Judeo-Christian heritage, such as Presidential proclamations and messages with respect to Jewish Heritage Week, Proclamation No. 4844, 46 Fed. Reg. 25077 (1981), Proclamation No. 6127, ____ Fed. Reg. ____ (May 3, 1990), and Jewish High Holy Days, 17 Weekly Comp. Pres. Doc. 1058 (Sept. 29, 1981). The President proclaimed 1983 to be the "Year of the Bible," Proclamation No. 5018, 48 Fed. Reg. 5527 (1983) in response to a Congressional Resolution, S.J.Res. 165, Pub. L, No. 97-280, 96 Stat. 1211 (1982).

Religious acknowledgments are also commonplace in state government. No less than 45 of the 50 states and the Commonwealth of Puerto Rico express gratitude to, or make other reference to, a deity or Supreme Being in their Constitutions. Illinois is one of the 45. The Preamble to the Illinois Constitution of 1848 proclaims:

> We, the people of the State of Illinois—grateful to Almighty God for the civil, political and religious liberty which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations—in order to form a more perfect government, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the State of Illinois. Ill. Smith-Hurd Annotated Statutes, Constitution.

The Illinois Constitutions of 1870 and 1970 contain essentially the same preamble as the Constitution of 1848 and include the same expression of gratitude to Almighty God and the same request for His continued blessing upon our endeavors. Ill. Smith-Hurd Annotated Statutes, Constitution.

This Court, other federal courts and state courts have repeatedly upheld government's acknowledgment of religion—both sectarian and non-sectarian—in governmental practices and displays. In *Marsh v. Chambers*, 463 U.S. 783 (1983), legislative prayer was upheld. In *McGowan v. Maryland*, 366 U.S. 420 (1961), Sunday closing laws were upheld. In *Zorach v. Clausen*, 343 U.S. 306 (1952), time release from school for religious training was upheld. In *O'Hara v. Paine*, 312 F.Supp. 434 (W.D. Texas 1969), *aff'd* 432 F.2d 66 (5th Cir. 1970), *cert. denied* 401 U.S. 955 (1971), court oaths were upheld.

In *Anderson v. Salt Lake City Corporation*, 475 F.2d 29 (10th Cir.), *cert. denied* 414 U.S. 879 (1973), the inscription of the Ten Commandments on a granite monolith was found permissible. In *Lynch v. Donnelly*, 465 U.S. 668 (1984), a nativity scene was allowed. In *County of Allegheny v. American Civil Liberties Union*, 109 S.Ct. 3086 (1989), a menorah was permitted. In *Eugene Sand & Gravel, Inc. v. City of Eugene*, 276 Or. 107, 558 P.2d 338 (1976), a cross as a war memorial was allowed. Creches were also found permissible in *Mather v. Village of Mundelein*, 864 F.2d 1291 (1989); *Allen v. Hichel*, 424 F.2d 944 (D.C. Cir. 1970); *Citizens v. City and County of Denver*, 508 F.Supp. 823 and 526 F.Supp. 1310 (D.C.Colo. 1981) affirmed in an unpublished opinion No. 82-1022 (10th Cir.); and *Conrad v. City of Denver*, 724 P.2d 1309 (Colo. 1986).

Sectarian images, i.e., nativity scenes, creches, menorahs, the Ten Commandments, the Bible and crosses have not been treated differently and should not be treated differently than non-sectarian symbols and proclamations, such as the eye of God and "In God We Trust," "So help me, God," "God save the United States and this Honorable Court," "under God" and "Almighty God."

From its onset, our Nation has pursued its belief in God and its Judeo-Christian heritage. The Declaration of Independence appealed "to the Supreme Judge of the World" and to "the laws of nature and of nature's God." It also proclaimed that all men "are endowed by their Creator with certain inalienable rights," and relied on "the protection of Divine Providence." In his first inaugural address, George Washington sought the blessings of God, "that Almighty Being," and "the Great Author of every public and private good." G. Washington, First Inaugural Address, in 1 *Messages and Papers of the Presidents* 44 (J. Richardson ed. 1897). At the conclusion of Washington's inaugural, the new President and both Houses of Congress attended a religious service conducted by the first Episcopal bishop of New York at St. Paul's Chapel in New York City, in accordance with a joint congressional resolution providing for the service. *See* A. Stokes & L. Pfeffer, *Church and State in the United States*, 87 (Rev. 1st ed. 1964).

The day after proposing the First Amendment to the Constitution, Congress called upon President Washington to proclaim "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favours of Almighty God." *Lynch*, 465 U.S. at 675 n.2. The President responded by proclaiming November 26, 1789 as a day of thanksgiving in which to offer "our prayers and supplications to the Great Lord and Ruler of Nations, and beseech Him to pardon our national and other transgressions." *Id.*

Presidents have continued to make references to God at public events. President Bush included an invocation and a benediction by the Reverend Billy Graham, and a prayer by President Bush himself. 135 Cong. Rec. S67 (daily ed. Jan. 20, 1989).

Non-adherents may deny the existence of God, but they cannot deny that the people of this country have maintained a strong belief in a deity. Nor can they close their eyes to our Judeo-Christian heritage, for it is acknowledged by our government at all levels.

Three judges on the Court of Appeals have urged this Court to take this case and a companion case involving the City of Rolling Meadows. Following are some of their views.

Judge Easterbrook, in his dissenting opinion, states:

> My colleagues say that Zion's seal violates the first amendment because it was designed by Rev. Dowie and adopted by the city council in 1902 to carry out the religious mission of the Christian Catholic Church. Indeed so; Zion was founded as a religious utopian community, and the Theocratic Party governed for more than two generations. In 1902 no one would have given this a second thought; the speech clause of the first amendment was not applied to the states until *Gitlow v. New York*, 268 U.S. 652 (1925), and the religion clauses were not extended to the states for another 27 years. *Zorach v. Clausen*, 343 U.S. 306 (1952). Given our commitment to cultural and religious diversity, *Wisconsin v. Yoder*, 406 U.S. 205 (1972), the establishment of religious communities is unexceptional. Many of this Nation's founders sought to establish religiously identifiable communities, and their value has been shown recently by the Mormons, who needed separate communities to survive hostility to their beliefs, and by the Amish, whose way of life is tightly integrated with their religious beliefs. The purpose behind Zion's creation—of which the seal is only an incidental part—does not count against it. App. 42a.

Judge Cudahy, with whom Judge Manion joined, dissented from the denial of the rehearing *en banc*. In doing so they stated:

> Whatever else may be said about the panel opinion . . . , its potential impact is sweeping. The rationale that any religious reference ("endorsement" is a misnomer) in a municipality's mark or name is constitutionally suspect apparently puts in jeopardy the names of famous cities across the land. St. Louis, Santa Fe, Los Angeles—even places like Devil's Head and Hell's Canyon (diabolism?)—come to mind, not to mention Zion itself. The resonantly Biblical name "Zion" for a city, under the present logic, advances and endorses Judaism or Christianity or both." App. 50a.
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> * * *
>
> In any event, the Zion seal merely reflects an historical fact—that the city was founded, named and emblemized as an act of protestant evangelism. It is not a function of the courts to cause the historical facts to vanish—even through a whiff of the First Amendment. App. 51a.

Judges Cudahy and Manion also expressed their opinion that the *Lemon* test had been met, stating, "In Zion both the 'effects' and the 'purpose' prongs are met by the historical setting of the seal. Any religious purpose resides far in the past while the current purpose is purely commemorative, and the present effects of the seal are only to call a unique history to mind." App. 51a.

The importance of Zion's historical origins was acknowledged by Judges Cudahy and Manion in stating, "The history of the City of Zion (Illinois) cannot be erased or obliterated. The city has stood for almost a hundred years as a memento of Christian evangelism. To destroy the seal, which contemporaneously reflected the founding of the city, is to demean an important value in the name of a threat which simply isn't there." App. 51a-52a.

The City of Zion should be permitted to retain its seal, emblem and logo as an acknowledgment of its historical religious origins.

II.

STANDING SHOULD NOT BE AFFORDED TRANSIENT PLAINTIFFS WHO ARE RECRUITED TO BRING ESTABLISHMENT CLAUSE ACTIONS.

In finding that Plaintiff Harris had standing to bring this action, the Court of Appeals for the Seventh Circuit overlooked that Harris had been recruited for the litigation, made false allegations as to being required to display a vehicle sticker with the Zion seal, claimed injuries which are self-imposed, and is a hypersensitive zealot.

In taking issue with the majority on the question of Harris' standing, Judge Easterbrook stated in his dissent that, "This looks like a put-up job distinct from the claim in *St. Charles* and *Crestwood* that longtime residents had been compelled by religious scruples to change the patterns of their lives." App. 34a. He noted that, "Harris related in his deposition that he had been recruited by the Society of Separationists as a potential plaintiff (apparently none of the existing residents of the city objected to the seal). He moved to a boarding house within the city's limits and lent his name to the litigation." App. 34a.

Also, in their dissent to the denial of the petition for rehearing in banc, Judges Cudahy and Manion stated: "The Zion seal has been part of that city's nearly 100-year history, and has always been so regarded (with affection and pride) until the plaintiff's claim of harm implausibly conjured up the First Amendment. Again, the claim of injury seems not only too far-fetched to win 'case or controversy' status but actually appears manufactured for purposes of litigation only." App. 51a.

The dissenting judges are correct in viewing this as a put-up job and manufactured controversy. Harris was not

a resident of Zion when Robert Sherman of the American Atheists first challenged the Zion seal, emblem and logo. It was only after Sherman was unable to find a resident of Zion willing to bring the action that he took Harris on a two-hour tour of Zion. Within a week, Harris rented a sleeping room in Zion and this lawsuit was filed in his name about one month later.

Harris claims a controversy based upon allegations that he must go out of his way to avoid seeing the religious imagery on the Zion seal, emblem and logo. Specifically, he alleges that he avoids driving during daylight hours within viewing distance of the Zion water tower on which is painted the Zion logo; he avoids attending City Council meetings because of the presence of the Zion seal in the Council room; he avoids looking at street name signs because they bear the Zion logo, and that, to avoid seeing the Zion seal, emblem and logo, he avoids walking to the library.

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982) holds that offense taken at the government's complicity in religion does not create standing. Cf. *Allan v. Wright*, 468 U.S. 737 (1984). The requirement that the plaintiff allege an "injury-in-fact," whether economic or non-economic, excludes simple indignation as a basis for Article III standing. That the plaintiffs may be offended by the defendants' conduct is not enough to confer standing. *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 268 (7th Cir. 1986). The federal courts simply are not constituted as "ombudsmen of the general welfare." *Valley Forge*, 454 U.S. at 487.

Judge Easterbrook, in his dissent, asks the question, "If offense is not enough, why is a detour attributable to that offense enough?" App. 33a. The majority responds that a

willingness to take a detour "validates the existence of genuine distress." App. 9a. However, as Judge Easterbrook notes, "*Valley Forge* tells us that dismay does not establish standing, and therefore new and better ways to prove its existence cannot create standing." App. 33a.

Harris also alleges that he is required to place a Zion vehicle sticker on the windshield of his automobile containing the Zion seal and is forced to view it during the totality of his driving time. Judge Easterbrook questions this allegation, pointing out that drivers are supposed to look at the road ahead of them, not at the vehicle stickers on their windshield. App. 36a. However, the record here presents a more basic problem. Harris admitted in his deposition that he did not own an automobile and did not currently have a car in Zion (R. Doc. 68, Harris dep. at 95-96).

Contrary to what is said in the majority opinion, the City of Zion did not admit that Harris was required to display a city vehicle sticker containing the seal on his windshield, but demanded strict proof thereof at trial (R. Doc. 43, par. 5). While standing is afforded a plaintiff in the first instance, based on the allegations in his complaint, the courts should not rely on such allegations to confirm standing if they are later proven to be false, and that is what happened here.

In fact, allegations regarding standing, if challenged, must be proven. *Lujan v. National Wildlife Federation*, 110 S. Ct. 3177 (1990); *Freedom from Religion Foundation, Inc. v. Zielke*, 845 F.2d 1463 (7th Cir. 1988); *O'Hair v. White*, 675 F.2d 680, 696 & n.35 (5th Cir. 1982) (in banc); and *Citizens Concerned for Separation of Church and State v. Denver*, 628 F.2d 1289, 1298 (10th Cir. 1980).

Judge Easterbrook points out that, "Harris has not incurred a 'tangible, albeit small cost that validates the exis-

tence of genuine distress' (majority op. at 9); he has incurred a tangible cost to expose himself to the seal. For Harris the seal is an attractive nuisance, not an irritant compelling changes of the sort we discussed in *St. Charles* and *Crestwood.*" App. 34a.

Harris' claimed injuries are self-imposed. He elected to rent a sleeping room in Zion fully aware that he had objections to the religious imagery on the city's seal, emblem and logo. He should not now be heard to complain that he changed his conduct to avoid looking at the religious imagery. Moreover, Harris has shown himself to be a hypersensitive zealot with an axe to grind. A reasonable, average person, whatever his or her belief or non-belief, simply does not detour around a water tower, avoid looking at street signs, avoid walking to the library and avoid attending City Council meetings so he will not see an assemblage of a small cross, dove, shield and crown and scepter.

Webster's New Collegiate Dictionary (1980) defines "carpetbagger" as a non-resident who meddles in politics or a northerner in the south after the American Civil War seeking private gain under the reconstruction governments. In a way, Harris fits that definition. He should not be afforded standing to bring this action under the Establishment Clause.

III.

RELIGIOUS IMAGERY ON GOVERNMENTAL SEALS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE, ABSENT SOME FORM OF GOVERNMENT COERCION.

Even though proper consideration of this matter under the *Lemon* test should result in a reversal, this Court may rule that governmental seals do not violate the Establish-

ment Clause, absent direct or indirect government coercion, and reverse on that ground.

In *Lee v. Weisman*, this Court issued a writ of certiorari to address two questions, one of which was "Whether direct or indirect government coercion is a necessary element of an Establishment Clause violation?" In his dissent, Judge Easterbrook stated:

> The establishment clause of the first amendment, as I understand it, forbids taxation and coercion in support of religion but does not forbid the display of religious symbols. *Allegheny County v. ACLU*, 109 S. Ct. 3088, 3134-46 (1989) (Kennedy, J., dissenting); *American Jewish Congress v. Chicago*, 827 F.2d 120, 128-40 (7th Cir. 1987) (Easterbrook, J., dissenting) . . . Religious imagery on city seals does not raise taxes (seals with crosses are no more costly to produce than seals using other symbols) or penalize nonobservance. The Constitution distinguishes threats from shadows. Zion's seal has been in use for 89 years without stifling religious diversity or slowing the conversion of a religious enclave to a secular city. App. 39a-40a.

There is an historical basis for requiring that government coercion be a necessary element of an Establishment Clause violation. James Madison, when he introduced the Establishment Clause in the First Congress, stated that he "apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship it in a manner contrary to their conscience." (1 Annals of Congress 730 (J. Gales ed. 1834) (Aug. 15, 1789). Madison also stated that the Establishment Clause would prevent the situation in which "one sect might obtain preeminence, or two combine together, and establish a religion to which they would compel others to conform."

Id. at 731. Similarly, Thomas Jefferson's Virginia Bill for Religious Liberty provided in part: "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened, in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief." 12 Hening, Statutes of Virginia 84 (1823) (quoted in *Everson v. Board of Education*, 330 U.S. 1, 13 (1947). See generally, McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

The Petitioners submit that the constitutional question should be whether the governmental seal, display or practice had a coercive effect on nonadherents, rather than whether it is deemed an "endorsement" of religion or a particular religious sect.

The Respondents will no doubt point out that the residents of Zion must display a city sticker containing the Zion seal on the windshield of their automobiles if they own and maintain an automobile within the City of Zion. However, nonadherents who object to the religious imagery may cut it out or cover it up. *Wooley v. Maynard*, 430 U.S. 705 (1977).

As Judge Easterbrook indicated in his dissent: "Perhaps a seal could penalize non-belief by striking fear into the hearts of viewers. See *Friedman v. Board of County Commissioners of Bernalillo County*, 781 F.2d 777 (10th Cir. 1985) (in banc). 'Con esta vencemos', Bernalillo County's slogan, was one the Jesuits used when burning heretics. When the police cars bearing it toured a predominantly Indian population, which had been mistreated by the Christians, there was reason to fear that the 'Chris-

tian police' were at hand, perhaps with the Grand Inquisitor in tow. 781 F.2d at 779. Zion's seal carries no such message to an objective (or any other) observer, and Rolling Meadows' is pallid." App. 40a.

As a test in Establishment Clause cases, "coercion" may not be perfect, but it is better than "endorsement" in deciding what should be prohibited and what should be permitted. This case is a good example. Judges Bauer and Flaum saw the Zion seal, emblem, and logo as an "endorsement" of the Christian faith and the Christian Catholic Church. On the other hand, Judges Easterbrook, Cudahy and Manion viewed the same seal, emblem, and logo as an acknowledgment or commemoration of Zion's historical origins. Regrettably, tests which are so subjective in nature do not serve our judicial system well. We need objective standards which produce consistency in the result of cases so that the winner or loser is not determined by the judge's predisposed views. Beauty may be in the eye of the beholder, but justice is not a beauty contest.

In this case, the Respondents used their interpretation of the Establishment Clause as a sword to attack religious imagery with which they disagreed. However, thus used, the Establishment Clause puts the nation into the position of "preferring those who believe in no religion over those who do believe." *Zorach v. Clausen*, 343 U.S. 306 (1952).

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit be granted and the case be set for plenary review, or,

in the alternative, that a decision on this petition for certiorari be deferred until this Court has decided *Lee v. Weisman*.

Respectfully submitted,

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